

REMARKS

Status of the Claims

Claims 1-3, 5-23, 28-29 and 31-34 are pending.

35 U.S.C. § 103 Rejection

Claims 1-3, 8-15 18-23, 28-29, and 31-34 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Szwerc (U.S. Patent No. 4,844,919--hereinafter Szwerc '919) in view of Applicants' Admitted Prior Art (hereinafter AAPA).

The Examiner asserts that Szwerc '919 teaches snack pieces comprising consistent concave-curved pieces with random surface features and then cites Figures 1-3 of Szwerc '919 as evidence of the presence of the random surface features. The Examiner cites the AAPA as evidence of non-planar snack pieces in a nested arrangement.

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference must teach or suggest all of the claim limitations.¹

Applicants respectfully disagree with the Examiner's contentions and assert that the Examiner has failed to present a *prima facie* case of obviousness against Applicants' claims using the combination of Szwerc '919 in view of the AAPA.

Applicants assert that the Szwerc/AAPA combination does not teach or suggest Applicants' random surface features. Rather, Szwerc '919 teaches a fused, substantially continuous particulate flavored topping composition (2)--see Figures 1-3.² The continuous particulate flavored topping composition of the Szwerc/AAPA combination directly teaches away from Applicants' invention. In their specification, Applicants state the following: "The definition of random surface features as found in the present invention do not include patterned surface features such as those found in Ridges®."³ In describing these types of surface features, Applicants note that these surface features are a continuous pattern.⁴ As noted above, Szwerc '919 provides a continuous topping composition.

Moreover, the only surface texture of any kind taught in Szwerc '919 is a "particulate starch coating" that is applied to one side of the snack piece to insure the snack curls during

¹ In re Vaeck, 947 F. 2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).

² Szwerc (U.S. Patent No. 4,844,919); col. 4, lines 46-49.

³ Applicants' Specification; page 20, lines 27-29.

cooking.⁵ Applicants contend therefore first that the so-called surface features found in the Szwer/AAPA combination are not Applicants' random surface features. Rather they are a continuous layer laid on top of the smooth surface of the snack pieces of the combination. Applicants further contend that even if the continuous layer could be interpreted as providing surface features to the snack pieces of the Szwer/AAPA combination, it would still not teach Applicants' random surface features, and in fact would teach away from Applicants' invention since Applicants have specifically disclaimed continuous layers as exclusively taught by Szwer '919 in the Szwer/AAPA combination. Thus there is no teaching or suggestion of the "random surface features" of the present claims.

Additionally, there is no motivation in the references themselves to make the combination that the Examiner suggests to be obvious. As described above, Szwer '919 does not teach or suggest random surface features, and the AAPA is included in the present specification for the sole purpose of distinguishing the prior art over the present claims. Thus, neither of these references include any motivation for the skilled artisan to make the combination suggested by the Examiner.

Thus, Applicants respectfully request reconsideration and allowance of Claims 1-3, 8-15, 18-23, 28-29, and 31-34 over the Examiner's 35 U.S.C. § 103(a) rejection under Szwer '919 in view of the AAPA.

Claims 1-3, 8-15 18-23, 28-29, and 31-34 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hamann (U.S. Design Patent No. 268,539--hereinafter Hamann '539) in view of Applicants' Admitted Prior Art (hereinafter AAPA).

The Examiner asserts that Hamann '539 teaches snack pieces comprising consistent concave-curved pieces with random surface features. The Examiner cites the AAPA as evidence of non-planar snack pieces in a nested arrangement.

Applicants respectfully disagree with the Examiner's contentions and assert that the Examiner has failed to present a *prima facie* case of obviousness against Applicants' claims using the combination of Hamann '539 in view of the AAPA.

Applicants assert that the Hamann/AAPA combination does not teach or suggest Applicants' random surface features. Rather, Hamann '539, which is, of course a design patent, has no description whatsoever. Hamann '539 does have drawings, which appear to show a curved potato product with a smooth surface and a less-smooth surface. The drawings do not show random surface features as defined in the present specification and discussed above.

⁴ Id. at page 20, lines 24-25.

More importantly, because Hamann '539 has no description, there is no motivation in the reference itself to make the combination that the Examiner suggests to be obvious. And the AAPA is included in the present specification for the sole purpose of distinguishing the prior art over the present claims. Thus, neither of these references include any motivation for the skilled artisan to make the combination suggested by the Examiner.

Thus, Applicants respectfully request reconsideration and allowance of Claims 1-3, 8-15, 18-23, 28-29, and 31-34 over the Examiner's 35 U.S.C. § 103(a) rejection under Hamann '539 in view of the AAPA.

Claims 1, 3, 8-13, 15, 18-19, 21-22 and 28 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Szwerc '919 in view of Carey, et al. (U.S. Patent No. 5,747,092--hereinafter Carey '092).

As noted above, Szwerc '919 teaches away from Applicants' invention by use of their continuous, and not random, topping layer on the snack pieces of the Szwerc/Carey combination. Applicants assert that no combination of references with Szwerc '919 cures this defect and that the Examiner has not properly met the burden of proving a *prima facie* case of obviousness against Applicants' claims.

Therefore, Applicants respectfully request reconsideration and allowance of their Claims 1, 3, 8-13, 15, 18-19, 21-22 and 28 over the Examiner's 35 U.S.C. § 103(a) rejection under Szwerc '919 in view of Carey '092.

Claims 5-6 and 16-17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Szwerc '919 in view of the AAPA, as applied herein previously, and further in view of Fink, et al. (U.S. Patent No. 6,129,939--hereinafter, Fink '939).

As noted above, Szwerc '919 teaches away from Applicants' invention by use of their continuous topping layer on the snack pieces of the Szwerc/AAPA/Fink combination. Applicants assert that no combination of references with Szwerc '919 cures this defect and that the Examiner has not properly met the burden of proving a *prima facie* case of obviousness against Applicants' claims.

Therefore, Applicants respectfully request reconsideration and allowance of their Claims 5-6 and 16-17 over the Examiner's 35 U.S.C. § 103(a) rejection under Szwerc '919 in view of the AAPA and further in view of Fink '939.

⁵ Szwerc (U.S. Patent No. 4,844,919); col. 4, lines 19-37.

Claim 7 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Szwerc '919 in view of the AAPA and Fink '939, as applied above, and further in view of Fritos Scoops.

Claim 7 depends from claim 5 which is believed to be patentable over the combination of Szwerc '919 in view of the AAPA and further in view of Fink '939 as detailed directly above. Fritos Scoops do not cure the deficiencies of the Szwerc, the AAPA and Fink. As such, the addition of Fritos Scoops does not render claim 7 obvious under 35 U.S.C. § 103(a) and it is respectfully requested that the present rejection be withdrawn.

Claims 5-6 and 15-17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Szwerc '919 in view of Carey '092 and further in view of Fink '939.

As noted above, Szwerc '919 teaches away from Applicants' invention by use of their continuous topping layer on the snack pieces of the Szwerc/Carey/Fink combination. Applicants assert that no combination of references with Szwerc '919 cures this defect and that the Examiner has not properly met the burden of proving a *prima facie* case of obviousness against Applicants' claims.

Therefore, Applicants respectfully request reconsideration and allowance of their Claims 5-6 and 15-17 over the Examiner's 35 U.S.C. § 103(a) rejection under Szwerc '919 in view of Carey '092 and further in view of Fink '939.

Claim 7 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Szwerc '919 in view of Carey '092 and Fink '939, and further in view of Fritos Scoops.

Claim 7 depends from claim 5 which is believed to be patentable over the combination of Szwerc '919 in view of Carey '092 and further in view of Fink '939 as detailed directly above. Fritos Scoops do not cure the deficiencies of the Szwerc, Carey and Fink. As such, the addition of Fritos Scoops does not render claim 7 obvious under 35 U.S.C. § 103(a) and it is respectfully requested that the present rejection be withdrawn.

Claims 2, 14, 20, 23 and 29 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Szwerc '919 in view of Carey '092 as applied herein previously and further in view of the AAPA.

As noted above, Szwerc '919 teaches away from Applicants' invention by use of their continuous topping layer on the snack pieces of the Szwerc/Carey/AAPA combination. Applicants assert that no combination of references with Szwerc '919 cures this defect and that the Examiner has not properly met the burden of proving a *prima facie* case of obviousness against Applicants' claims.

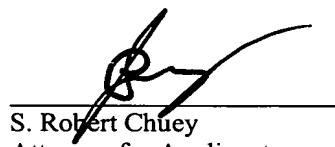
Therefore, Applicants respectfully request reconsideration and allowance of their Claims 2, 14, 20, 23 and 29 over the Examiner's 35 U.S.C. § 103(a) rejection under Szwerc '919 in view of Carey '092 and further in view of the AAPA.

SUMMARY

In light of the remarks contained herein, Applicants respectfully request reconsideration of the rejections and their withdrawal.

Issuance of a Notice of Allowance at an early date is earnestly solicited.

Respectfully submitted,
STEPHEN ZIMMERMAN, ET AL.



S. Robert Chuey
Attorney for Applicants
Registration No. 39,140
(513) 634-0102

October 5, 2005
Customer Number 27752